

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL **77-7091**

To be argued by
ROBERT H. PETERSON

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

FORD MOTOR COMPANY,

Plaintiff-Appellant,

against

M.V. "AUSTRAL ENTENTE", her engines,
boilers, etc.,

and against

FARRELL LINES, INC.; UNIVERSAL TERMINAL
and STEVEDORING CORPORATION and FRANK J.
HOLLERAN, INC., *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT-APPELLEE
FRANK J. HOLLERAN, INC.**

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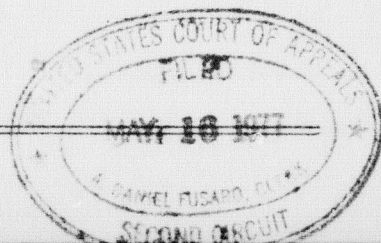


TABLE OF CONTENTS

	PAGE
The Issue Presented for Review	1
Statement of the Case	2
The Facts	2
POINT I—The District Court was correct in holding that the provisions of the bill of lading extended the benefit of the contractual and statutory pack- age limitation to Holleran and Universal and that the liability of both appellees, if any, should be limited to the sum of \$500 per package	3
POINT II—Ford's conclusory allegation that the dam- ages herein were sustained as a result of negli- gence in connection with stowing and securing the goods of another shipper under another bill of lading should not bar Holleran and Universal from the benefit of the package limitation	9
POINT III—The absence of the word "lashers" in the Himalaya clause should not bar Holleran from claiming the benefit of the package limitation ..	11
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Bernard Screen Printing Corp. v. Meyer Line</i> , 328 F. Supp. 288 (S.D.N.Y. 1971), <i>aff'd</i> , 464 F.2d 934 (2d Cir. 1972) (<i>per curiam</i>), <i>cert. denied sub</i> <i>nom. Bernard Screen Printing Corp. v. Universal</i> <i>Terminal & Stevedoring Corp.</i> , 410 U.S. 910 (1973)	5, 6, 12
--	----------

	PAGE
<i>Cabot Corp. v. S.S. Mormacscan</i> , 298 F. Supp. 1171 (S.D.N.Y. 1969). <i>aff'd. on other grounds</i> , 441 F.2d 476 (2d Cir. 1970), <i>cert. denied sub nom. John W. McGrath Corp. v. Cabot Corp.</i> , 404 U.S. 855 (1971)	9, 10
<i>Carle & Montanari, Inc. v. American Export Is- brandtsen Lines, Inc.</i> , 275 F. Supp. 76 (S.D.N.Y.), <i>aff'd.</i> , 386 F.2d 839 (2d Cir. 1967) (<i>per curiam</i>), <i>cert. denied sub nom. Carle & Montanari, Inc. v. John W. McGrath Corp.</i> , 390 U.S. 1013 (1968) ..	5, 8
<i>Goodwin Ferreira & Co. v. Lamport Holt Ltd.</i> , 34 Lloyds List F.R. 192, 141, L.T.R. [M.S.] 494 (KB 1929)	10
<i>Grace Line, Inc. v. Todd Shipyards Corp.</i> , 500 F.2d 361 (9th Cir. 1974)	7
<i>Hoegh Lines v. Green Truck Sales, Inc.</i> , 298 F.2d 240 (9th Cir. 1962)	10
<i>McLeod Lumber Co. v. Crowley</i> , 8 F.2d 283 (N.D. Cal. 1925)	10
<i>Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Limited</i> , 2 All E. R. 158 (1954) [2 Q.B. 408]	10
<i>Remington Rand v. American Export Lines</i> , 132 F. Supp. 129 (S.D.N.Y. 1955)	10
<i>Secrest Machine Corp. v. S.S. Tiber</i> , 324 F. Supp. 671 (S.D. Ga.), <i>aff'd.</i> , 450 F.2d 285 (5th Cir. 1971) (<i>per curiam</i>)	7
<i>Tessler Brothers (B.C.) Ltd. v. Itaipacific Line</i> , 494 F.2d 438 (9th Cir. 1974)	7, 8
Statutes:	
Carriage of Goods by Sea Act:	
46 U.S.C. 1303(2)	8
46 U.S.C. 1304(5)	2, 4, 5

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BRIEF OF DEFENDANT-APPELLEE FRANK J. HOLLERAN, INC.

The Issue Presented for Review

Are the defendants-appellees, Frank J. Holleran, Inc., (Holleran) and Universal Terminal and Stevedoring Corporation (Universal), entitled to the benefit of the same \$500 per package limitation which plaintiff-appellant, Ford Motor Company (Ford), concedes the defendant-appellee, Farrell Lines, Inc. (Farrell), is entitled to pursuant to the

provisions of clause 25 of the bill of lading and the United States Carriage of Goods By Sea Act, 46 U.S.C. § 1304(5)?

Statement of the Case

This is an appeal by Ford from so much of an interlocutory Order and Judgment in an admiralty action in the United States District Court for the Southern District of New York (Wyatt, J.) which limits Ford's recovery against Universal and Holleran to \$500 per package for the contents of each of the seven cases involved in this litigation (pp. 5a-6a).^{*} Ford concedes that Farrell is entitled to limit its liability to \$500 per package (p. 18a). Following certification by District Judge Wyatt, pursuant to 28 U.S.C. § 1292 (b) (p. 6a), this Court granted leave to appeal (p. 32a).

The Facts

On or about March 31, 1975, seven crates of machinery were delivered to Farrell's loading stevedore at Port Newark, New Jersey, Universal, for carriage on board the M.V. "AUSTRAL ENTENTE" to Melbourne, Australia (p. 12a). The seven-crate shipment was loaded and stowed aboard the vessel by Universal in the upper 'tween deck of Bay 19 on or about April 1, 1975 (p. 14a). After the stowage had been completed, the cargo was secured by lashers and carpenters employed by Holleran on April 2, 1975 (p. 14a). The vessel sailed from Port Newark during the early hours of April 3, 1975 (p. 14a).

On or about April 4, 1975, while the vessel was at sea, the cargo in the upper 'tween deck of Bay 19 allegedly broke stow causing damage to various cargoes, including the seven crates of Ford machinery (pp. 14a-15a). Ford contends that the damage sustained to its cargo then oc-

^{*} References are to pages in the Joint Appendix.

curred. Ford's contention as to the cause of the damage to its cargo is vigorously denied by all appellees. Nevertheless, for the purposes of this appeal, it will be assumed *arguendo* that Ford's contention is correct.

POINT I

The District Court was correct in holding that the provisions of the bill of lading extended the benefit of the contractual and statutory package limitation to Holleran and Universal and that the liability of both appellees, if any, should be limited to the sum of \$500 per package.

Ford's cargo was transported pursuant to a short form ocean bill of lading which by its own terms is subject to the provisions of the United States Carriage of Goods by Sea Act (COGSA) and which also incorporated by reference the provisions of Farrell's regular long form bill of lading (p. 9a Exhibit "A"; p. 11a Exhibit "B"). Farrell's long form bill of lading contained a "clause paramount" again incorporating COGSA as well as the following two relevant provisions.

"4. BENEFICIARIES OF EXEMPTIONS, ETC.—(a) Because of the relationship between them and as the carrier requires persons and companies to perform or assist it in performance of work or services undertaken by it in this contract, *it is expressly agreed between the parties hereto that the master, officers, crew members, contractors, stevedores, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier in the performance of such work or services, shall each be the beneficiaries of and shall be entitled to the same*, but no further, exemptions and immunities from and limitations of liability which the carrier has under this bill of lading, whether printed, written, stamped thereon or incorporated by reference. (Emphasis ours)

(b) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivision (a), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under Clauses 25 and 26 of this bill of lading.

(c) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivisions (a) and (b), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under the U.S. Carriage of Goods by Sea Act, including but not limited to Sections 3(6), 4(1), 4(2)(a), 4(2)(b), 4(2)(q) and 4(5) of said Act."

"25. VALUATION—In the event of any loss of or damage to or in any connection with goods exceeding in actual value \$500 per package lawful money of the United States, or in case of goods not shipped in packages or per customary freight unit, the value of the goods shall be deemed to be \$500 per package or per customary freight unit as the case may be, and the carrier's liability, if any, shall be determined on the basis of a value of \$500 per package or per customary freight unit, unless the nature of the goods and a higher value shall be declared by the shipper in writing before shipment and inserted in this bill of lading. . . ."

Section 4(5) of COGSA, referred to in Clause 4(c) of the bill of lading aforesaid, provides as follows:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that

sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . ." 46 U.S.C.A. § 1304(5).

A review of the relevant case law makes it palpably clear that the foregoing language in clause 4 of the bill of lading is more than sufficient to extend to Holleran the benefit of the package limitation.

In *Carle & Montanari, Inc. v. American Export Isbrandtsen Lines, Inc.*, 275 F. Supp. 76 (S.D.N.Y.), *aff'd.*, 386 F.2d 839 (2d Cir. 1967) (*per curiam*), *cert. denied sub nom. Carle & Montanari, Inc. v. John W. McGrath Corp.*, 390 U.S. 1013 (1968), the so-called "Himalaya clause" of the bill of lading sought to protect ". . . the Master, officers and crew of the vessel, *all agents and all stevedores and other independent contractors whatsoever . . .*" 275 F. Supp. at 78 (emphasis by the Court). This language, it was held, adequately expressed the intent of the contracting parties to extend the carrier's contractual limitation of liability to the defendant stevedore.

The law does not require, however, that the party to be protected be specifically and precisely identified, as was the stevedore in *Carle & Montanari, supra*. The measure of specificity required for clarity was discussed in *Bernard Screen Printing Corp. v. Meyer Line*, 328 F. Supp. 288 (S.D.N.Y. 1971), *aff'd.*, 464 F.2d 934 (2d Cir. 1972) (*per curiam*), *cert. denied sub nom. Bernard Screen Printing Corp. v. Universal Terminal & Stevedoring Corp.*, 410 U.S. 910 (1973), in which the Himalaya clause provided in part as follows:

" . . . It is understood and agreed that, other than said shipowner or demise charterer, no person, firm or corporation or other legal entity whatsoever (*including the master, officer and crew of the vessel and all agents and independent contractors*) is, or shall be deemed to

be, liable to the shipper or consignee as carrier, bailee or otherwise howsoever in contract or in tort. If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility to the shipper or consignee, all defences (including all limitations of said [sic] exonerations from liability) provided to said shipowner or demise charterer by law or by terms hereof shall be available to such other. . . ." 328 F. Supp. at 289 (emphasis by the Court).

In the *Bernard Screen* case the District Court stated at p. 290:

"The requirement of 'clarity of language' serves a salutary purpose so that limitations of liability may not rest upon vague and ambiguous terms. But this does not mean that language, which is unequivocal, should be ignored merely because it fails to catalog the various particulars which form a definite, expressed entity. Language in a contract should be construed in its context and with an eye to the function to be accomplished."

Noting that "clarity is not synonymous with specificity", *Ibid*, the District Court also stated at p. 290 as follows:

"In using the words 'independent contractors' in the instant bill of lading, sufficient guidelines were expressed to indicate the intention of the parties. It was unnecessary to list specifically all possible constituent elements of that term, *which would include all the contractors who rendered service for the carrier in connection with the shipment*. Where a class of persons such as 'independent contractors' is referred to in a contract, it is clear that the class includes all those reasonably falling within the definition of that class and within the context of the transaction. No further degree of particularity is necessary to give the term clarity." *Ibid*. (Emphasis ours)

The law is the same in every jurisdiction. In every case where a Himalaya clause has named as a beneficiary either an "independent contractor" or a "contractor", the benefits of the carrier's defenses have been extended. See, e.g., *Tessler Brothers (B.C.) Ltd. v. Itaipacific Line*, 491 F.2d 438 (9th Cir. 1974), in which a stevedore was granted the benefits of the carrier's limitations upon the time to sue and amount of liability, pursuant to the provisions of a Himalaya clause which sought to protect any "... servant or agent of the Carrier (including every independent contractor from time employed by the Carrier) . . .", 494 F.2d at 441, n.1. See also *Secrest Machine Corp. v. S.S. Tiber*, 324 F. Supp. 671 (S.D. Ga.), *aff'd.*, 450 F.2d 285 (5th Cir. 1971) (*per curiam*), in which the bill of lading provided:

"All defenses as aforesaid shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor performing any of the Carrier's obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort." 450 F.2d at 286.

The same result obtained in *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361 (9th Cir. 1974), in which the Court held that a dry dock operator was entitled to the benefit of the carrier's package and time limitations pursuant to the terms and conditions of a Himalaya clause which read as follows:

"... the master, officers, crew members, *contractors*, stevedores, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier in the performance of such work or services [undertaken in this contract] . . ." (emphasis by the Court) 500 F.2d at 367.

In the case at bar, both Farrell and Holleran have testified that Holleran performed its securing services pursuant to an oral agreement with Farrell (pp. 29a-30a). Its

services are conceded by Ford to be necessary (see Brief of Plaintiff-Appellant at p. 10). They constitute a necessary and important function undertaken by Farrell in the performance of its duties to properly and carefully carry, keep and care for cargo carried. See 46 U.S.C. § 1303(2). Under these circumstances, it is beyond dispute that Holleran was a "contractor . . . used, engaged, or employed by the carrier in the performance of such work or services . . ." within the meaning of the Farrell bill of lading. Therefore, Holleran is entitled to the benefit of the same contractual and statutory package limitations to which the carrier, Farrell, is concededly entitled.

Ford now seeks to nullify the plain language of its contract with Farrell on the grounds that the bill of lading is "a contract of adhesion" which "must be looked upon with distrust" and that limitations upon liability "will be strictly construed against the parties whom it is claimed to benefit." (See p. 4). It is difficult to comprehend how Ford can contend that the bill of lading is a "contract of adhesion" since it admittedly exports millions of dollars of cargo each year. Ford is not a small shipper being forced into "contracts of adhesion" by large carriers.

The cases on point recognize that a limitation of liability for damage to goods is less drastic than a complete exoneration from liability. Unlike an exoneration, a limitation does not induce negligence. *Tessler Brothers (B.C.) Ltd. v. Italpacific Lines, supra*, 494 F.2d at 443. Similarly, in *Carle & Montanari, Inc. v. American Export Isbrandtsen Lines, Inc., supra*, the Court observed:

"If plaintiff wanted to avoid the \$500 per package limitation of liability in the bill of lading, it could have declared a higher value and paid extra freight."
275 F. Supp. at 79.

If Ford's contentions in these regards were serious, it would not have consented to partial summary judgment

granting limitation in favor of Farrell, the party that issued the bill of lading it now attacks. Since Ford conceded that Farrell is entitled to benefit of the package limitation, it follows that Holleran and Universal are likewise entitled to the package limitation.

POINT II

Ford's conclusory allegation that the damages herein were sustained as a result of negligence in connection with stowing and securing the goods of another shipper under another bill of lading should not bar Holleran and Universal from the benefit of the package limitation.

Ford claims that the damages herein sued for were caused by cargo owned by another shipper first breaking stow and then causing damage to Ford's cargo. Negligence is therefore ascribed to work and services performed by Universal in connection with loading and stowing of that other cargo, and on the part of Holleran, in lashing, bracing, shoring, and otherwise securing that same other cargo. Thus Ford argues that the Himalaya clause herein, which protects "contractors required to perform work or services undertaken by the carrier in this contract" (p. 11a; Exhibit "B"), does not apply to services relating to another bill of lading (*i.e.*, that issued to the owner of the cargo which plaintiff claims first broke stow). This proposition is based upon the District Court decision in *Cabot Corp. v. S.S. Mormacscan*, 298 F. Supp. 1171 (S.D.N.Y. 1969), *aff'd. on other grounds*, 441 F.2d 476 (2d Cir.), *cert. denied sub nom. John W. McGrath Corp. v. Cabot Corp.*, 404 U.S. 855 (1971). In that case, the benefit of the carrier's package limitation was denied to a loading stevedore whose employees negligently permitted two heavy steel plates, owned by a stranger to the action, to drop onto plaintiff's cargo. The District Court reasoned that the stevedore was not rendering services in connection

with Cabot's bill of lading, i.e., "this contract." A review of appellee's brief filed with this Court in the *Cabot* case, *supra*, discloses that the "this contract" theory was presented as a ground for affirmance but the theory was rejected by this Court in affirming on a different ground, i.e., that the clause in the *Cabot* case lacked sufficient clarity to identify the stevedore as a "carrier". This Court apparently accepted the arguments in opposition to the "this contract" theory presented in appellant's brief in which they cited *McLeod Lumber Co. v. Crowley*, 8 F.2d 283 (N.D. Cal. 1925); *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Limited*, 2 All E. R. 158 at 162 (1954) [2 Q.B. 408]; *Hoegh Lines v. Green Truck Sales, Inc.*, 298 F.2d 240 (9th Cir. 1962); *Remington Rand v. American Export Lines*, 132 F. Supp. 129 (S.D.N.Y. 1955); and *Goodwin Ferreira & Co. v. Lamport Holt Ltd.*, 34 Lloyd's List F.R. 192, 141, L.T.R. [M.S.] 494 (KB 1929). The "this contract" argument advanced by Ford is, therefore, before this Court for a second time.

The *Cabot* case does not speak to the case at bar, since the Himalaya clause in that case was markedly different from the Farrell bill of lading provisions, i.e., 4(a), (b) and (c) involved in this appeal. In particular, the beneficiaries of the carrier's defenses in the *Cabot* case were not specifically identified as "contractors" and "stevedores".

Notwithstanding the inapplicability of *Cabot* to the Ford bill of lading, Holleran respectfully submits that the District Court decision is not sound. The ocean carrier, and all persons and companies assisting that carrier, owe to the shipper a duty to exercise reasonable care in protecting his goods from foreseeable harm. Holleran and Universal owed a duty to Ford to use due care, both in stowing and securing the Ford cargo herein, and also in stowing and securing other cargoes which conceivably could create a risk of foreseeable harm to Ford's cargo.

In the case at bar, the duty owed by Farrell and all its contractors, in stowing, securing, and otherwise handling

the mining machinery which plaintiff claims first broke stow herein, flowed both to the owner of that mining machinery and to the owners of all other cargoes foreseeably endangered by it. In lashing that mining machinery, Holleran was still performing work and services undertaken by Farrell under the Ford bill of lading: i.e., protecting Ford's cargo from harm during carriage. Obviously, any negligence on the part of Holleran and Universal in stowing and securing the mining machinery constituted a breach of duty owing to the owner of that cargo; but that negligence also constituted a breach of duty owing under "this contract" in the performance of work or services undertaken by Farrell in "this contract". In fact, that duty is the genesis of Ford's claims against Holleran and Universal. Consequently, Holleran and Universal are entitled to claim the benefit of the carrier's package limitation, regardless of which cargo was negligently handled.

POINT III

The absence of the word "lashers" in the Himalaya clause should not bar Holleran from claiming the benefit of the package limitation.

Ford's brief notes that stevedores and longshoremen are among those specifically enumerated as beneficiaries of the carrier's defenses in the Himalaya clause herein; but, since lashers are not mentioned, Ford argues that the doctrine of "*inclusio unius est exclusio alterius*" should preclude the lashers' employer from asserting the package limitation in its favor. The Court below correctly rejected this frivolous argument.

Ocean carriers now recognize that certain kinds of shore-side activities cannot be performed economically using full-time employees of the carrier. Thus, a wide variety of functions connected with the handling and protection of cargoes before and after actual carriage are now performed by contractors who hire their own employees and

who render services to many ocean carriers. Depending on the particular terminal involved, one commonly encounters in the Port of New York clerks, checkers, hilo operators, crane operators, truck drivers, bulldozer operators, carpenters, lashers, welders, coopers, watchmen, armed guards and various other categories of employments, performing important services connected with ocean carriage. To expect an ocean carrier to draft an explicit, all-inclusive provision on a single-page negotiable instrument, which already includes a wide variety of contractual conditions, and thus to cover in precise detail every function performed at every port served by the carrier is, in simplest terms, absurd.

The District Court opinion in *Bernard Screen Printing Corp. v. Meyer Line*, *supra*, specifically rejected the argument now urged by Ford, that plain language such as that in the Ford bill of lading, should be ignored

“because it fails to catalog the various particulars which form a definite expressed entity.” 328 F. Supp. at 290.

CONCLUSION

The Order and Judgment of District Judge Wyatt (p. 5a) should be affirmed.

Respectfully submitted,

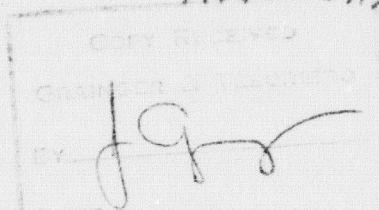
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has and truly serves as Two copies
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